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Supreme Court of the United States

OCTOBER TERM, 1936

No. 667.

ANNISTON MANUFACTURING COMPANY,
a Corporation,

Petitioner,

vs.

HARWELL G. DAVIS, Collector of Internal Revenue,

Respondent.

BRIEF OF AMICUS CURIAE.

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BRIEF OF AMICUS CURIAE.

I.

Statement of interest.

Charles W. Priddy & Company, a Virginia corporation, through its attorneys, Toy D. Savage, of Norfolk, Va. and William R. Perkins, of 30 Rockefeller Plaza, New York City, files this brief *amicus curiae* in support of the contentions of the Petitioner in the above entitled case. It is vitally interested in the questions thereby presented because they are involved in an identical action (now on appeal in the Circuit Court of Appeals for the Fourth Judicial Circuit) which was instituted by it on November 22, 1935, in the District Court of the United States for the Eastern District of Virginia, against N. B. Early, Jr., Collector of Internal Revenue for the District of Virginia, to recover $77,773.41 paid on the manufacture of bags from jute fabric during the period Janu-

ary 1934 to April 1935 as processing taxes under the Agricultural Adjustment Act.

Claim for refund had been filed July 13, 1935, in accordance with the applicable Sections 3220, 3224, 3226 and 3228, as amended, of the Revised Statutes (26 USCA 1670, 1543, 1672-3 and 1433) and rejected by the Commissioner on the ground that said Act was constitutional. Demurrers were interposed by the Collector which asserted first Sec. 21(d) added to said Act by the Amendments approved August 24, 1935 (Public No. 320, 74th Congress) and then Secs. 901-913, Title VII of the Revenue Act of 1936, approved June 22, 1936, which latter are the very statutes involved in the very same way in the above entitled case.

The District Court (Judge Way) overruled the demurrers and rendered judgment for the full amount claimed, with interest, because it was of opinion, as stated in its order, that:

> "* * * as applied to the facts and circumstances so appearing from the allegations of the declaration of plaintiff herein, Section 21(d)(1) of the 1935 amendment to the Agricultural Adjustment Act, set up by the original demurrer of the defendant filed herein on February 26, 1936, and Title VII of the Revenue Act of 1936, set up by the second demurrer of the defendant filed herein on September 22, 1936, are unconstitutional and void as to the rights of the plaintiff in this case, for the reason that said Section 21(d)(1) of the 1935 amendment to the Agricultural Adjustment Act and Title VII of the Revenue Act of 1936 are not merely procedural but, if held to be valid and given effect, would destroy the vested substantive rights of plaintiff, * * *."

II.

Essential facts.

The payments sought to be recovered were, and are, unconstitutional collections by the Federal Government to which it has not, and cannot by ratification have, any right or title of any kind whatever. This is settled beyond all controversy by the decisions of this Court in the *Butler* and *Rice Millers* cases (297 U. S. 1, 110).

These payments were made on the faith of the familiar statutory provisions as to refund then applicable—namely, Secs. 3220, 3224, 3226 and 3228, as amended, of the Revised Statutes (26 USCA 1670, 1543, 1672-3 and 1433). They had been a part of the Federal Revenue System for years and neither by their terms nor in their administration was there ever the slightest suggestion that a passing on of the tax would in any way affect the refund. On the contrary, if the taxpayer showed the collection wrongful in fact or law he obtained full refund, with interest, without more, unless he had slept on his rights. Thus did the refund provisions of the statutes conform to the constitutional provisions with respect to the taking of property by taxation.

Only after these payments had been thus made, and the constitutionality of the Agricultural Adjustment Act came seriously to be questioned, was provision made whereby, if valid, the Federal Government might retain these payments, though unconstitutionally collected, to the extent that the processor, who alone might file claim for refund, had passed on the tax.

Such provisions were first enacted in Sec. 21(d), added to the Agricultural Adjustment Act by the Amendments of August 24, 1935. It provided, among

other things, by subdivision (1) that no recovery could be had in any manner of any amount theretofore or thereafter paid under the Agricultural Adjustment Act unless the claimant established to the satisfaction of the Commissioner that neither the claimant, nor anyone for him, had "included such amount in the price of the article" or had "passed on any part of such amount to the vendee or to any other person in any manner".

For Sec. 21(d), which was quite generally deemed unconstitutional (see Note), the Revenue Act of 1936 has now substituted Title VII, Secs. 901-913 (7 USCA 644-655), and it is their meaning and validity which constitute the questions at issue.

While these new sections differ in their phraseology from Sec. 21(d), disregarding their procedural provisions (such as requiring a new claim for refund, imposing new statutes of limitation, erecting a new board of review, and prescribing complex and arbitrary rules for ascertaining the "passing on"), it will be found that their substantive provisions constitute an integral scheme of legislation to accomplish the very same end which Sec. 21(d) sought to accomplish. These substantive provisions are:

(1) Sec. 910, which, if valid, would forbid any proceeding against a Collector and thereby restrict the taxpayer to the limited relief offered by the other sections of this legislation, by providing that no Collector

"shall be in any way liable to any person for any

NOTE: *G. B. R. Smith Milling Co.* v. *Thomas* (D. C. N. D. Tex.), 11 F. S. 833; *John A. Gebelein* v. *Milbourn* (D. C. Md.), 12 F. S. 105; *Baltic Mills Co.* v. *Batgood* (D. C. Conn.), 12 F. S. 132; *Kingan & Co.* v. *Smith* (D. C. S. D. Ind.), 12 F. S. 329; *Larabee Flour Mills* v. *Nee* (D. C. Mo.), 12 F. S. 395; *A. P. W. Paper Co.* v. *Riley* (D. C. N. D. N. Y.), 12 F. S. 738; and *Shenandoah Milling Co.* v. *Early* (D. C. Va.), 3 U. S. L. W. Index 119.

> act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act or for the recovery of any money exacted by or paid to him and paid into the Treasury in performance of his official duties under the provisions of such Act."

(2) Sec. 902, which definitely limits the recovery of the taxpayer, through the remedy to which he is thus restricted, by its provisions that:

> "No refund shall be made or allowed in pursuance of court decisions or otherwise of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act,"

unless the claimant satisfactorily establishes, in the manner and before the tribunal designated by these sections,

> "(a) That he bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor, nor shifted such burden, directly or indirectly, * * *, or
>
> "(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

Of course this means that to the extent the claimant may not be able to bear the burden of proof thus thrown upon him with respect not only to himself, but as to his vendee and the latter's business and affairs, the Federal Government will retain the payments, though unconstitutionally collected, just as would have been the case under Sec. 21(d). And what this burden

of proof means in this respect is shown, not only by the complexity and arbitrariness of the provisions of the lengthy Sec. 907 (which we forbear to detail), but also by the very nature of the tax. It is not a tax on sales, added by the manufacturer to his bill of sale, as in *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386. On the contrary, it is a tax on the act of processing, which is required to be paid by the processor (Sec. 9(a) of AAA), whether or not the product is ever sold, and as such enters into the cost and has no relevancy to the sale price. It falls strictly within the category described by this Court in *Lash's Products Co.* v. *United States*, 278 U. S. at 176, when it said:

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer, and on him alone. * * * The purchaser does not pay the tax. He pays, or may pay, the seller more for the goods because of the seller's obligation, but that is all. * * * The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price * * *."

This is settled, and therefore such taxes are not upon exports (*Cornell* v. *Coyne*, 192 U. S. 418) and may be imposed on products sold States (*Liggett & Myers Tobacco Co.* v. *United States*, 81 L. ed. 215). In *Liggett & Myers Tobacco Co.* v. *United States*, (C. C. A. 3rd) 77 F. (2d) 65, 67, the Court declared the similar tax on the manufacture of tobacco products to be "a plain occupational tax imposed upon the manufacturer without reference to the sale or place of sale of the manufactured products".

Ascertainment of the passing on of such a tax has been the despair of both courts and economists (see

Indian Motor Cycle Co. v. *United States*, 283 U. S. at 581-2, and Notes 1 and 2 to said opinion). District Judges of long experience expressed their considered opinions that such conditions imposed by Sec. 21(d) were practically impossible to perform. See: *G. B. R. Smith Milling Co.* v. *Thomas*, (D. C. N. D. Tex.) 11 F. S. at 835; *John A. Gebelein* v. *Milbourn*, (D. C. Md.) 12 F. S. at 123-4; *Baltic Mills Co.* v. *Bitgood*, (D. C. Conn.) 12 F. S. at 134; *Kingan & Co.* v. *Smith*, (D. C. S. D. Ind.) 12 F. S. at 335; *A. P. W. Paper Co.* v. *Riley*, (D. C. N. D. N. Y.) 12 F. S. at 742-3; and *Shenandoah Milling Co.* v. *Early*, (D. C. Va.) 3 U. S. L. W. Index 119.

III.

Said Sections 902-913 are wholly unconstitutional because they constitute an integral plan which allows, and was intended to allow, the Federal Government to retain exactions unconstitutionally collected under AAA in the name of taxation.

Passing by two of the vital constitutional questions presented, namely:

(1) The attempt of these sections retroactively to abolish the taxpayer's cause of action against the Collector—a purely personal action between private citizens which dates from the common law and to which the United States is a stranger (*Sage* v. *United States*, 250 U. S. 33, 37; *Graham* v. *Goodcell*, 282 U. S. 409, 430-1);

(2) The attempt of these sections retroactively to impose an arbitrary and discriminatory burden of proof, which is perhaps impossible of performance, as a condition of obtaining refund (*Nichols* v. *Coolidge*, 274 U. S. at 542; *Coolidge*

v. *Long*, 282 U. S. at 596; *Heiner* v. *Donnan*, 285 U. S. at 326);

we confine this brief to this single constitutional question, also presented and which we consider fundamental:

> Can the Federal Government thus impose an integral scheme of legislation with respect to the refund of previous unconstitutional collections in the name of taxation, with the intent and effect that thereby it may retain the whole or a part of such unconstitutional collections?

In order to discuss this question in its true light we should remark preliminarily that, while the legislation involved is sought to be sustained on the theory that thereby the Government is preventing processors from unjustly enriching themselves, its real object is not restoration of the tax payments to those who bore their burden but retention by the Government of amounts it could not constitutionally collect—a course of conduct which this Court has declared not only "unjustly enriched" the Government (*Moore Ice Cream Co.* v. *Rose*, 289 U. S. at 378-9) but "immoral" and "a fraud on the taxpayer's rights" (*Bull* v. *United States*, 295 U. S. at 261). Such a course of conduct on the part of the Government is therefore the real issue here; and it is neither related to, nor condoned by, the effort of the processor to recoup this added item of cost in the difficult depression days.

As District Judge Paul most pertinently remarked of Sec. 21(d) in the *Shenandoah Milling Co. Case*, *supra*:

> "The court is not impressed by the argument that the government should not be compelled to pay the taxpayer anything except what he him-

> self can show he has paid. That position is that the government wants to keep money it has illegally collected from someone else because that other person cannot show where he got it. The equities of the government are not above the equities of the citizen."

Similarly, District Judge Otis said in the *Larabee Mills Co. Case, supra:*

> "* * * * In the multitude of cases in which equity has enjoined the collection of illegal taxes none can be found in which the taxpayer has been required to show affirmatively that if he pays the tax, he will not include it or some part of it in the prices of commodities or services which he sells. * * * The funds from which he will pay the tax are his funds and not the less so because they may be replenished by the sale of his products to others. He has been damaged when his money has unlawfully been taken from him and not the less so because he may make himself whole through the consummation of some contract not with the wrongdoer, but with some third person."

The question, therefore, is not one of the *right* of the Government to retain these payments—it has no such *right* because the payments were collected unconstitutionally. That is settled. It is purely a question of whether or not the Federal Government has the *power* so to restrict by this retroactive legislation the unrestricted terms of the statutes for refund (which the Agricultural Adjustment Act adopted for the purposes of that Act, upon the faith of which the advance payments were made and in virtue of which the Government sought to prevent injunctive relief against other such payments, even after Sec. 21(d) was mooted) in order that it may now retain the whole or a part of such payments, though they be unconstitutionally collected.

If the Federal Government were suing to collect the amounts it seeks thus to retain, it would be totally unable to recover (regardless of whether the processor had or had not passed on the amount claimed) because the Federal Government has no constitutional right to collect. In the *Rice Millers Case* (297 U. S. 110) this Court unanimously declared that if a Collector should then attempt to collect amounts as processing taxes under the Agricultural Adjustment Act "he would be a trespasser"; and this would be true whether or not the processor had passed on the tax.

If the provisions of Secs. 902-913 had been in force when the payments in question were made, collection of such payments could have been enjoined on the ground that such sections afforded a remedy, by way of claim for refund, too uncertain and inadequate to comply with the requirements of the Fifth Amendment (*Union P. R. Co.* v. *Weld*, 247 U. S. at 285-6; *Wallace* v. *Hines*, 253 U. S. at 67-8; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. at 679-82; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. at 509-11; *Graves* v. *Texas Co.*, 298 U. S. at 401-4).

It follows, necessarily, that the factual possession of such collections by the Federal Government by reason of their advance payment under such circumstances gives rise to no such power. Otherwise an easy way will have been found of circumventing most vital provisions of the Constitution for safeguarding the rights of the citizen from both Federal and State action in respect to taxation, since the applicable clause has the same meaning in both the Fifth and Fourteenth Amendments (*Heiner* v. *Donnan*, 285 U. S. at 326). And not only that, but by the same process there may be a like circumvention of the provisions of the Constitution with respect to eminent

domain; for here also acquisition by the Government first occurs, and thereafter come ascertainment and relief for the property owner (*Phillips* v. *Commissioner*, 283 U. S. at 597).

The Federal Government may not thus play fast and loose with the provisions of the Constitution as respects either taxation or eminent domain (*Davidson* v. *Board of Administrators*, 96 U. S. at 102; *Monongahela Nav. Co.* v. *United States*, 148 U. S. at 336-7). The system of Federal tax collection, by which the citizen first pays and then his rights are ascertained and relief awarded under claim for refund, has been sustained solely on "the underlying principle" that by such payment the rights of the taxpayer were not changed, but there occurred only a postponement of the ascertainment and relief in that respect because of the convenience of the Government with regard to its revenues (*Phillips* v. *Commissioner*, 283 U. S. at 595-7). Among the questions thus postponed was that of the constitutionality of the exaction, which the Courts held did not entitle the taxpayer to an injunction restraining payment because the provisions for refund afforded him just as full a measure of relief (*Bailey* v. *George*, 259 U. S. 16; *Graham* v. *Du Pont*, 262 U. S. 234). Manifestly, therefore, the legislation here involved, to the extent the Federal Government may thereby retain unconstitutional collections, flies squarely in the face of this underlying principle and the provisions of the Constitution which necessitated it. This is established and illustrated by the whole course of judicial authority on this subject.

On this account under this system of federal tax collection the Government is regarded throughout as being in the attitude of thereby collecting from its citizen. This was fully explained and authoritatively

held in *Bull* v. *United States*, 295 U. S. 247, 259-60, where this Court said:

> "Thus the usual procedure for recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. * * * But these reversals of the normal process of collecting a claim cannot obscure the fact that, after all, what is being accomplished is a recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken, in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer."

On this account, also, such payments create even more than an obligation on the Federal Government to refund the unconstitutional collections. The Government holds such collections as a trustee for the benefit of the taxpayer, bound in that respect as would be an individual, with its sovereignty in no wise involved. The retention of such collections by the Federal Government is "immoral and amounts in law to a fraud on the taxpayer's rights". This was the unanimous conclusion of this Court in *Bull* v. *United States*, 295 U. S. at 261, where it said of such retentions:

> "* * * Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of their agent. *United States* v. *State Nat. Bank*, 96 U. S. 30, 24 L. ed. 647. *While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights.* What was said in the *State*

> *Nat. Bank* case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial * * * In these cases, [cited in the opinion] and many others that might be cited, the rules of law applicable to individuals were applied to the United States' (pp. 35, 36). A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. *United States* v. *Macdaniel*, 7 Pet. 1, 16, 17, 8 L. ed. 587, 592, 593; *United States* v. *Ringgold*, 8 Pet. 150, 163, 164, 8 L. ed. 899, 903, 904." (Italics ours.)

In *United States* v. *State Natl. Bank*, 96 U. S. 30, 36, whose ruling this Court in the *Bull* case thus adopted and applied, the doctrine had been broadly stated, on a review of the authorities, that:

> "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. *Their sovereignty is in no wise involved.*" (Italics ours.)

These essential facts and principles control, and totally distinguish this case from those urged by the Government in support of this legislation.

These facts and principles prevent the Government from retaining such unconstitutional collections under the cases with respect to the immunity of a sovereign

from suit. The *Bull* case has established, as we have just seen, that the immunity of the sovereign has no relationship to, and cannot be asserted to authorize, such retentions of unconstitutional collections, because such retentions are in fraud of the taxpayer's rights and thus constitute a trust fund for his benefit, in respect of which the Federal Government is liable in its corporate character, just as would be an individual, with its sovereignty in no wise involved. See, to the same effect, *United States* v. *Lee*, 106 U. S. at 218-21, where Mr. Justice Miller, speaking for this Court, in most forceful and eloquent language upheld the power and the duty of the Federal Judiciary to enforce the provisions of the Fifth Amendment for the rescue of property unconstitutionally taken by the Federal Government, just as in *Ex parte Milligan*, 4 Wall. at 118-24, it had upheld and enforced such provisions for the protection of life and liberty.

In addition, sovereign immunity is not an authority for the legislation here involved, because it does not simply withdraw the consent of the United States to be sued; it goes further and nullifies the right of refund afforded the taxpayer when he made the payments, a right which belongs to him in virtue of the Constitution. Said sections strictly confine the right of refund for exactions under the Agricultural Adjustment Act to the narrow compass they specify, and beyond that compass by virtue of this legislation the right to refund of these payments has been abolished, if this legislation be valid. In *Lynch* v. *United States*, 292 U. S. 571, after an exhaustive review of the authorities on this subject, it was held that sovereign immunity could not save a statute which likewise would have prevented recovery on war veterans' insurance policies, because that Act did not simply withdraw the consent of the Government to be sued, but abrogated the contractual right expressed in the policies and thereby offended the Fifth Amendment.

Squarely in point is *Graham* v. *Goodcell*, 282 U. S. 409, 430-1, where this Court unanimously declared of the very same argument on the part of the Government:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen*, 206 U. S. 391, 51 L. ed. 1106, 27 S. Ct. 742, 11 Ann. Cas. 688, *supra*. The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. *Sage* v. *United States*, 250 U. S. 33, 37, 63 L. ed. 828, 830, 39 S. Ct. 415; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4, 5, 66 L. ed. 99, 100, 101, 42 S. Ct. 1. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 679, 680, 74 L. ed. 1107, 1112, 1113, 50 S. Ct. 451."

In *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338, this Court reached a similar conclusion with respect to a kindred attempt on the part of a State. It held that Florida could not by retroactive legislation retain tolls unlawfully collected, saying:

> "But courts cannot go very far against the literal meaning and plain intent of a constitutional

> text. Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right."

These essential facts and principles likewise totally distinguish this case from another case urged in support of this legislation—*Cary* v. *Curtis*, 3 How. 236. While in that case the Act had a prospective operation only, so that it amply warned taxpayers, and dealt with foreign commerce, as to which the power of Congress is extremely broad (*Buttfield* v. *Stranahan*, 192 U. S. 470), even permitting the imposition of charges that are not true taxation (*Head Money* cases, 112 U. S. 580), nevertheless the majority opinion indignantly denied that the Act involved in any way sought to preclude the taxpayer from securing a full recovery. Pointing out that the Act simply transferred the proceeding from the Collector who had paid in the money to the Government which had received and held the money, and in so doing left many ways (which the Court specified) by which the taxpayer could obtain full refund, the Court declared (3 How. at p. 250):

> " * * * The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from, and indeed are the only foundation of a right of recovery in this particular form of action. And here is presented the answer to the assertion that by the Act of 1839, or by the con-

> struction given to it by this court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither have Congress nor this court furnished the slightest ground for the above assertion."

In this category fall those decisions which uphold the right of the Federal Government to impose conditions, such as the form of the claim for refund, its review by the Commissioner or Board, and a statute of limitations on the presentation and review of the claim, and a suit in that respect (examples of which are *Cheatham* v. *United States*, 92 U. S. 85; *Arnson* v. *Murphy*, 109 U. S. 238; and *Schoenfeld* v. *Hendricks*, 152 U. S. 691) or which enlarged the taxpayer's right of recovery (as in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373). In none of them did the Government seek, as here, to minimize the taxpayer's right of recovery. On the contrary, each Act involved left ample remedy for full recovery and the Court often made this plain. Thus, in the *Moore Ice Cream Co. Case*, which upheld a statute dispensing with protests, the Court used this language, which is quite pertinent in the instant case:

> "In this situation the Government was *unjustly enriched* at the expense of the taxpayer when it held on to moneys that had been illegally collected, whether with protest or without. * * * A high minded government renounced an advantage that was felt to be ignoble and set up a new standard of equity and conscience." (pp. 378-9; our italics)

These essential facts and principles also totally distinguish the case upon which, perhaps, most reliance is placed to support the legislation involved here—*United States* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386. Aside from the fact that in the *Jefferson Case*

the manufacturer was acting but as the agent of the Government for the collection of a sales tax, the Act involved in that case not only contemplated and provided for refund to the taxpayer of that portion of the payments which on the ascertainment under the Act it was found he had absorbed or refunded, but also for that portion which upon such ascertainment it was found he had passed on and not refunded, upon the simple condition that he give bond to refund such portion to those who had really borne it. Thus the Act contemplated and provided for a complete refund, without the Federal Government retaining any part whatever of the wrongful collections; and it was this which caused the Court to uphold the statute, for it said that under these circumstances it did not do

> "more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest. We do not perceive in the restriction any infringement of due process of law." (pp. 401-2)

In the instant case, quite to the contrary, the said Secs. 902-913 make no provision for a refund of that portion of the unconstitutional exactions which upon the ascertainment under the complex and arbitrary terms they impose the taxpayer may find himself unable to prove he has either absorbed or refunded to a vendee who himself absorbed, without any shifting or reimbursement. They thus contemplate and provide for retention of unconstitutional collections by the Government,—indeed, we know this legislation was framed with the intent and expectation that thereby large portions of these unconstitutional collections

might through its terms be thus retained. In this vital, paramount respect, therefore, the Act involved in the instant case, in both its intent and its effect, differs from the Act involved in the *Jefferson Case* as the night differs from the day, and it is impossible for the Act involved in the instant case to find support in the *Jefferson Case*, unless a case which sustains an Act that contemplates and provides for full refund of wrongful collections is a precedent for an Act which contemplates and provides for the retention by the Federal Government of unconstitutional collections.

Conclusion.

Accordingly, we respectfully submit that, for the reasons and upon the authorities above given, Secs. 902-913 of Title VII of the Revenue Act of 1936 constitute an integral piece of unconstitutional legislation, framed as a scheme by which the Government may retain unconstitutional collections, in the name of taxation, under the Agricultural Adjustment Act, and wholly void on that account (*Carter* v. *Carter Coal Co.*, 298 U. S. at 312-13; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. at 361-2; and cases cited by them).

March 15, 1937.

Respectfully submitted,

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